# TABLE OF CONTENTS

Page

Motion to Dismiss ..... 1

ARGUMENT:

I. There is no jurisdiction over the appeal under 28 U.S.C. 1257 (2) ..... 2

II. No substantial federal question is presented ..... 8

Conclusion ..... 10

CASES CITED:

Bransford, Ex parte, 310 U.S. 354 (1940) ..... 3

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) ..... 3

Charleston Federal Sav. & Loan Asso. v. Alderson, 324 U.S. 182 (1945) ..... 3, 4

Citizens Nat. Bank v. Durr, 257 U.S. 99 (1921) ..... 9

De Veau v. Braisted, 363 U.S. 144 (1960) ..... 7

Garrity v. New Jersey, 385 U.S. 493 (1967) ..... 3

Grayson v. Harris, 267 U.S. 352 (1925) ..... 9

Houston Oil Co. v. Goodrich, 245 U.S. 440 (1918) ..... 9

TABLE OF CONTENTS

Page

CASES CITED:

Jett Brothers Distilling Co. v. Carrollton,
252 U.S. 1 (1919) ..... 3, 4

Layne & Bowler Corp. v. Western Well Works,
261 U.S. 387 (1923) ..... 9

Lerner v. Casey,
357 U.S. 468 (1958) ..... 3

North Carolina R. Co. v. Zachery,
232 U.S. 248 (1914) ..... 6, 7

Portland R. Co. v. Railroad Commission,
229 U.S. 397 (1913) ..... 9

Rice v. Sioux City Cemetery,
349 U.S. 70 (1954) ..... 9

Rohr Aircraft Corp. v. County of San Diego,
362 U.S. 628 (1960) ..... 3

Southern Power Co. v. North Carolina Public Service Co.,
263 U.S. 508 (1924) ..... 9

Thompson v. Louisville,
362 U.S. 199 (1960) ..... 7

Trego v. Modesto Irrigation District,
164 U.S. 179 (1896) ..... 6

United States v. Johnston,
268 U.S. 220 (1925) ..... 9

Walters v. St. Louis,
347 U.S. 231 (1953) ..... 8

TABLE OF CONTENTS

Page

STATUTES CITED:

Federal Employer's Liability Act of April 22, 1908, 35 Stat. at L. 65, Chap. 149 ..... 6, 7

New Jersey Sewerage Authorities Law of 1946 ..... 1, 2, 3, 5, 7

New York Waterfront Commission Act of 1953, N.Y. Laws 1953, cc 882, 883 ..... 7

R.S. 40:14A-1 ..... 1, 2, 8

Surplus Property Act of 1944, 58 Stat. 765 ..... 3

15 U.S.C. 601 ..... 3

28 U.S.C. 1257 (2) .....1, 2, 5, 6, 7, 8, 10

28 U.S.C. 2103 ..... 1, 4

## MOTION TO DISMISS

The Appellee moves the Court to dismiss the appeal herein from the judgment of the Supreme Court of New Jersey on the ground that the validity of the *New Jersey Sewerage Authorities Law of 1946*, Revised Statutes of New Jersey, Title 40, Chapter 14A, Section 1 and following *R.S.* 40:14A-1, *et seq.*, is not "drawn in question . . . on the ground of its being repugnant to the Constitution . . ." as required under Title 28 of the United States Code, Section 1257(2), 28 U.S.C. 1257(2). Alternatively, treating the appeal as a petition for certiorari under 28 U.S.C. 2103, the appellee moves the Court to deny the petition on the ground that it fails to present a substantial federal question.

## ARGUMENT

### I. There is no jurisdiction over the appeal under 28 U.S.C. 1257(2).

The appellants rely on 28 U.S.C. 1257(2) as conferring jurisdiction on this Court to hear the appeal from the judgment of the Supreme Court of New Jersey, 28 U.S.C. 1257(2) provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (2) By appeal, where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States and the decision is in favor of its validity."

The state statute relied upon by appellants as coming within Section 1257(2) is the *New Jersey Sewerage Authorities Law of 1946, R.S.* 40:14A-1, *et seq.* The appellant's Jurisdictional Statement, however, does not attack the validity of such statute per se, but rather attacks the validity of its implementation and application to them by the Carlstadt Sewerage Authority on the ground that they are being deprived of equal protection of the laws and due process under the Fourteenth Amendment. (Appendix B, p. 42a). The appellee submits that the latter claim is not encompassed by Section 1257(2).

Section 1257(2) is applicable only where a state statute is challenged as unconstitutional as written. A challenge to unconstitutional implementation of a valid state statute may only be made by a petition for certiorari

under Section 1257(3). *Rohr Aircraft Corp. v. County of San Diego,* 362 U.S. 628, 629-30 (1960); *Charleston Federal Sav. & Loan Asso. v. Alderson,* 324 U.S. 182, 185 (1945); *Jett Brothers Distilling Co. v. Carrollton,* 252 U.S. 1, 6 (1919); See *Burton v. Wilmington Parking Authority,* 365 U.S. 715, 717, 721, 726, 727 (1961); *Lerner v. Casey,* 357 U.S. 468, 473 (1958); *Cf. Garrity v. New Jersey,* 385 U.S. 493 (1967) (state statute too tangentially involved to form the basis of an appeal); *Ex parte Bransford,* 310 U.S. 354, 361 (1940) (distinguishing between a petition in the Federal District Court for an injunction against the enforcement of a state statute on the ground of its unconstitutionality and a petition seeking an injunction on the ground of the unconstitutionality of the result obtained by use of a state staue which is not attacked as unconstitutional).

In *Rohr Aircraft Corp. v. County of San Diego, supra,* the appellant appealed from a judgment of the Supreme Court of California affirming a lower state court judgment holding that realty, title to which was in the Reconstruction Finance Corporation, fell within the scope of Section 8 of the Reconstruction Finance Corporation Act, 15 U.S.C. 601, which subjected to local taxation any real property of the Corporation, even though such property had been declared to be surplus under the *Surplus Property Act of 1944,* 58 Stat. 765. The appellant had leased the property from the Corporation and by terms of its leases undertook to pay all taxes legally assessed against the property. It contended that taxation of the property under state law violated its rights under the Fourteenth Amendment in light of the *Surplus Property Act of 1944, supra.* This Court dismissed the appeal and in so doing stated, ". . . it has long been settled that an attack upon a tax assessment or levy, such as [appellants] here made on the ground that it infringes a

taxpayer's federal rights, privileges, or immunities, will not sustain an appeal. . . . *Charleston Federal Sav. & Loan Asso. v. Alderson,* 324 U.S. 182, 185 (1945)". Although the Court did treat the appeal as a petition for certiorari under 28 U.S.C. 2103 and granted certiorari, it adhered to the principle that an appeal will not lie from improper implementation of a valid state statute.

In *Charleston Federal Sav. & Loan Asso. v. Alderson, supra,* the appellant appealed an assessment of their property at its full value by tax officials of West Virginia on the ground that the official's mode of valuation of property of the same class belonging to other taxpayers denied the appellants equal protection of the laws under the Fourteenth Amendment. Such assessment as well as valuation was made by the tax officials in implementation of state law and the Supreme Court of Appeal of West Virginia affirmed the tax officials' action. This Court dismissed the appeal.

> "It is essential to our jurisdiction on appeal . . . that there be an explicity and timely insistence in the state courts that a state statute, as applied, is repugnant to the Federal Constitution, treaties or laws. [cases cited] And it has long been settled that an attack upon a tax assessment or levy, such as appellants here made, on the ground that it infringes a taxpayer's Federal rights, privileges, or immunities, will not sustain an appeal . . . [cases cited] . . . *While the opinion (of the Supreme Court of Appeal of West Virginia) intimates that appellant's objection was made to the administration of the statute, it nowhere indicates that they contended that, as applied, the statute was invalid as repugnant to the Federal Constitution.*" at 185-86. (emphasis added.)

In *Jett Brothers Distilling Co. v. Carrollton, supra,* the appellant appealed the judgment of the Court of Appeals of Kentucky which had affirmed a lower state court

judgment holding appellant liable for a tax levy by the appellee, City of Carrollton, upon distilled spirits belonging to appellant in a bonded warehouse in Carrollton. This Court dismissed the appeal on the ground that the validity of a state statute had not been truly drawn in question.

> "What is meant by the validity of a statute or authority was discussed by this court in *Baltimore & P. R. Co. v. Hopkins,* 130 U.S. 210, in which this court, speaking by Mr. Chief Justice Fuller, said: 'Whenever the power to enact a statute as it is by its terms or is made to read by construction is fairly open to denial and denied, the validity of such statute is drawn in question, but not otherwise.' And the Chief Justice added, upon the authority of *Millinger v. Hartupee,* 6 Wall 258, 261, 262, that the word 'authority' stands upon the same footing.
>
> In order to give this court jurisdiction by writ of error . . . it is the validity of the statute or authority which must be drawn in question. The mere objection to an exercise of authority under a statute whose validity is not attacked cannot be made the basis of a writ of error from this court. There must be a substantial challenge of the validity of the statute or authority, upon a claim that it is repugnant to the Federal Constitution, treaties ,or laws, so as to require the state court to decide the question of validity in disposing of the contention . . ." at 6.

In all three of the above cases, this Court dismissed attempted appeals, because state statutes were not drawn in question as required by 28 U.S.C. 1257(2). So too, in the instant case, the *New Jersey Sewerage Authorities Law of 1946, supra,* is not truly drawn in question. In this regard, the first three cases cited by the appellants in support of the jurisdiction of this Court under Section 1257(2) are all distinguishable in that state statutes were drawn in question.

In *Trego v. Modesto Irrigation District,* 164 U.S. 179 (1896), the appellant's real contention was that amendments to a California statute authorizing the establishment of irrigation districts within the state operated to deprive him of property without due process of law. The amendments provided that special elections could be called by the board of directors of the district to approve the issuance of bonds by the district, that property owners of the district could withdraw their land from the district by a court approved petition and that the board of directors could obtain a judicial determination of the validity of proceedings in respect to the issuance of bonds, before or after their issuance. The appellant contended that the three amendments collectively operated to unconstitutionally permit court approval of the binding of property owners within a diminished district, due to the withdrawal of other property owners, to an earlier vote by all the property owners of the original district approving the issuance of bonds, even though such bonds had not been issued. Thus, specific provisions of an amended state statute as written were alleged to collectively violate the Fourteenth Amendment. "... [T]he real contention of the defendant was and is that the operation of the statute is to deprive him of property without due process of law." 164 U.S. 179 at 185. The right of the defendant to appeal to this Court under the predecessor of 28 U.S.C. 1257(2) was, therefore, sustained.

In *North Carolina R. Co. v. Zachery,* 232 U.S. 248 (1914), the appellant railroad appealed the judgment of the North Carolina Supreme Court affirming the judgment of a lower state court holding that North Carolina state law and not the Federal Employer's Liability Act of April 22, 1908, 35 Stat. at L. 65, Chap. 149, applied to a civil action for the negligent killing of locomotive fireman. This Court

sustained the appeal under the predecessor of 28 U.S.C. 1257(2) as the validity of the applicable state statute vis a vis the Federal Employer's Liability Act was clearly drawn in question. In the instant case, however, there is no alleged conflict between the *New Jersey Sewerage Authorities Law of 1946* and any other federal law or allegation that the former law is inapplicable to the instant case. Thus, *North Carolina R. Co. v. Zachary* is likewise inapposite to the instant case.

In *De Veau v. Braisted*, 363 U.S. 144 (1960), a specific statutory provision of the *New York Waterfront Commission Act of 1953*, N.Y. Laws 1953, cc 882, 883, was challenged as preempted by Federal labor laws, violative of the due process clause of the Fourteenth Amendment and invalid as a bill of attainder or ex post fact law. The validity of the provision was upheld by the Court of Appeals of New York against the foregoing challenge. The appellant then appealed to this Court, which held that the case was properly before it on appeal. Again, however, there was an allegation of a conflict between the provision and specific federal labor laws and the provision was attacked as unconstitutional per se rather than implementation thereunder. Thus, in all three of the above cases a state statute was actually drawn in question.

Finally, the last case cited by appellants as supporting jurisdiction under 28 U.S.C. 1257(2), *Thompson v. Louisville*, 362 U.S. 199 (1960) is inapplicable. It was brought to the Court as a petition for certiorari and not by appeal. In brief, all those cases cited by the appellants are either distinguishable from or inapplicable to the instant case.

The opinion of the New Jersey Supreme Court sets forth the issue raised by appellant as follows: "Does The Division Of The Municipality Into Two Sewer Districts

Violate The Terms of *N.J.S.A.* 40:14A-1, *et seq.*, and The Fourteenth Amendment of the United States Constitution." (Appendix B, p. 42a). The two questions presented in the appellant's Jurisdictional Statement basically restate the issue as posed by the New Jersey Supreme Court. In summary, the appellant does not attack a state statute, but mere exercise of authority under such statute and the latter does not constitute a basis for appeal under 28 U.S.C. 1257(2).

## II. No substantial federal question is presented.

The basic issue presented by the appellants in their Jurisdictional Statement is a factual one, namely, whether their lands warrant the installation and direct charging for special sewer service in relation to the remaining lands of the Borough of Carlstadt. In this regard, the law is well-established. In *Walters v. St. Louis,* 347 U.S. 231 (1953) this Court stated:

> "Equal protection does not require identity of treatment. It only requires that classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary." at 237.

The New Jersey Supreme Court found several factors warranted the different treatment of appellants' lands from other Carlstadt lands for sewerage purposes, eg., use, topography, pollution, absence of other alternatives. (Appendix, p. 47a). Such factual determination should not be subject to certiorari. This Court has consistently held that it will not exert its jurisdiction merely to review a decision

of a state court upon a question of fact. "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); see also *Grayson v. Harris*, 267 U.S. 352, 358 (1925); *Portland R. Co. v. Railroad Commission*, 229 U.S. 397, 412 (1913); *Fry Roofing Co. v. Wood*, 344 U.S. 157, 160 (1952); *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 509 (1924); *Houston Oil Co. v. Goodrich*, 245 U.S. 440, 441 (1918). Cf. *Citizens Nat. Bank v. Durr*, 257 U.S. 99 (1921).

In the final analysis, the issue presented by appellants to this court is important only as to them. There is no showing, other than a blanket assertion, that property owners in other municipalities have been, are being or will be affected by the decision in this case. In this regard, the concept of importance as a basis for certiorari relates to the importance of the issues "to the public as distinguished from" importance to the particular "parties" involved. *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923); *Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1954). In summary, the law concerning the appellants' claim is settled, the claim is basically a factual one and its resolution only has importance for the appellants. Under such circumstances, a substantial federal question is not presented and certiorari should not be granted.

## CONCLUSION

**Wherefore, Appellee respectfully submits that the Court does not have jurisdiction over the instant appeal under 28 U.S.C. 1257(2) and moves the Court to dismiss the appeal. Alternatively, the Appellee respectfully submits that the case does not present a substantial federal question and that certiorari should be denied.**

Respectfully submitted,

/s/ Alfred J. Porro Jr.
ALFRED J. PORRO JR.
*Counsel for Appellees*

*On the Brief:*

GEORGE N. PAPPAS

TONITA SANDO FLYNN